No. 06-[illegible] 2007

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In The
SUPREME COURT OF THE UNITED STATES

DENON KITT

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition For a Writ of Certiorari
To The District of Columbia Court of Appeals

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QUESTION PRESENTED

Whether the Defendant was denied his Constitutional right of due process, as guaranteed by the Fifth and Sixth Amendments of the U.S. Constitution when the D.C. Court of Appeals allowed charges to stand when the jury was wrongly instructed on the aiding and abetting portions of the charges, thereby permitting the jury to decide the case without determining, to a reasonable doubt, each and every element of the offenses with which they were convicted, thereby violating the standards set in *In Re Winship, 397 U.S. 358 (1970). See also U.S. v. Gaudin*, 515 U.S. 506 (1995)

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Denon Kitt
United States of America

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OPINION BELOW

The District of Columbia Court of Appeals issued opinion No. 98-CF-1013 on August 3, 2006. The decision is reported at 904 A.2d 348 (D.C., 2006). The District of Columbia Court of Appeals denied a petition for rehearing and/or rehearing en banc on March 21, 2007. The opinion is reprinted at p. 1 of the Appendix, and the denial for rehearing is reprinted in the Appendix at p.19

JURISDICTION

The D.C. Court of Appeals filed its decision on August 3, 2006 affirming certain counts of the indictment, reversing others, and remanding the case back down to the D.C. Superior Court for a resentencing. On March 21, 2007, the D.C. Court of Appeals denied the Appellant's petition for rehearing and for rehearing en banc. This Court has jurisdiction under 28 U.S.C. §1257(b) to review the District of Columbia Court of Appeals decision on a writ of certiorari.

U.S. CONSTITUTIONAL PROVISIONS

AMENDMENT V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district whrein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS

D.C. Code § 22-1805. Persons advising, inciting, or conniving at criminal offense to be charged as principals.

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or

abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

D.C. Code § 22-2803 Carjacking

(a)(1) A person commits the offense of carjacking if, by any means, that person knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempts to do so, shall take from another person immediate actual possession of a person's motor vehicle.

(2) A person convicted of carjacking shall be fined not more than $5,000 and be imprisoned for a mandatory-minimum term of not less than 7 years and a maximum term of not more than 21 years, or both.

(b)(1) A person commits the offense of armed carjacking if that person, while armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles), commits or attempts to commit the offense of carjacking.

(2) A person convicted of armed carjacking shall be fined not more than $10,000 and be imprisoned for a mandatory-minimum of not less than 15 years and a maximum term of not more than 40 years, or both. However, the court may impose a prison sentence in excess of 30 years only in accordance with § 24-403.01(b-2). For purposes of imprisonment following

revocation of release authorized by § 24-403.01(b)(7), armed carjacking is a Class A felony.
Notwithstanding any other provision of law, a person convicted of carjacking shall not be released from prison prior to the expiration of 7 years from the date of the commencement of the sentence, and a person convicted of armed carjacking shall not be released from prison prior to the expiration of 15 years from the date of the commencement of the sentence.

D.C. Code § 22-2801. Robbery

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years.

D.C. Code § 22-4502(a)(1) Additional penalty for committing crime while armed (first offense):

(a) Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles):
(1) May, if such person is convicted for the first time of having so committed a crime of

violence, or a dangerous crime in the District of
(2) Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to and including, 30 years for all offenses except first degree murder while armed, second degree murder while armed, first degree sexual abuse while armed, and first degree child sexual abuse while armed, and shall, if convicted of such offenses while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 5 years; ...

....

(c)Any person sentenced pursuant to paragraph (1)...above for a conviction of a crime of violence while armed with any pistol or firearm, shall serve a mandatory-minimum term of 5 years, if sentenced to paragraph (1) of subsection (a) of this section,....

D.C. Code § 23-1331(4): Crime of Violence

The term "crime of violence" means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter;

manufacture or possession of a weapon of mass destruction; mayhem; murder, robbery, sexual abuse in the first, second, or third degrees; use, dissemination or detonation of a weapon of mass destruction; or an attempt or conspiracy to commit any of the foregoing offenses.

STATEMENT OF FACTS

Denon Kitt was charged as one of two participants in the armed robbery, abduction and murder of Jesse Lee Baker. Tried by jury separately from his alleged accomplice, Kitt was convicted of one count of first-degree premeditated murder while armed, three counts of first-degree felony murder while armed, the three predicate felonies of armed robbery, kidnapping and carjacking, and possession of a firearm during a crime of violence. The D.C. Court of Appeals reversed Kitt's premeditated murder and felony murder (carjacking) convictions for lack of proof that he had the requisite mens rea to commit these two offenses. The Court also found that the two felony murder counts merged so that [1]only one could stand. The Court of Appeals invited the trial court to select one of the felony murder counts to vacate and to vacate the underlying felony count in the other felony murder conviction.

Jesse Baker, the decedent, was the landlord of an apartment building complex located in the 3700 block of First Street, S.E., Washington, D.C. Jesse Baker visited the

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[1] On April 20, 2007, the lower Court chose to vacate the Felony Murder Charge based on armed robbery and likewise vacated the Armed Kidnapping Charge. That left the Defendant convicted of Felony Murder (Armed Kidnapping), Armed Robbery, Armed Carjacking and Possession of a Firearm during a Crime of Violence or Dangerous Offense. He resentenced the Defendant in chambers and without a hearing to from (30) thirty to life on the felony murder charge; from (5) five to (15) fifteen to run concurrent on the Possession of a firearm during a crime of violence or a dangerous offense, concurrent;from (15) fifteen to (45) forty-five years on the Armed Carjacking, to run consecutive; and from (5) five to (15) fifteen on the Armed Robbery, to run consecutive. A motion to reconsider the resentencing of the Defendant without holding a hearing at which he is present is pending.

complex on March 7, 1997 to collect rent. On that occasion, two men accosted Baker as he was about to leave, asking him "What you got, what you got?" The two then went through his pockets, removed his keys and forced him into the back of his car and drove off, with Kitt at the wheel and another man, Steven Crockett in the front passenger seat. Witnesses claimed they recognized Kitt as one of the perpetrators and identified Crockett's picture as the second man participating in the offense. Crockett was tried later and convicted of related charges for the offense.

Also on March 7, 1997, Baker's body was found in the backseat of his car in the alley of the 2200 block of Prout St., S.E., Washington, D.C. He had gunshot wounds in three places in his body, and gun shots were the cause of his death. A witness had observed Kitt in the vicinity of Prout St earlier that evening, removing his coat and running fast towards his grandmother's house. Another witness, Kitt's close friend, Tom Catlett, testified that Kitt came to him and said that "he had got into a situation that he wasn't supposed to be in" with Crockett—"a murder situation." Kitt told Catlett that "Sweets," a name Crockett goes by, unexpectedly shot someone with whom they were riding in a car." "He [Kitt] said he took his eyes off the scene for a minute and a gun went off." Catlett further testified that Crockett had displayed a .38 caliber revolver to him and Kitt a few weeks before the shooting.

The trial court, over the objection of the defendant, gave the following instruction on aiding and abetting:

> Any person who, in some way, intentionally participates in the commission of a crime, aids and abets the principal offender. He, therefore, is guilty of the crime as he would be if had personally committed each of the acts that make up the crime.

To find that the defendant aided and abetting in the committing of the crime, you must find the defendant knowingly associated himself with the person who committed the crime, that he participated in the crime as something he wished to bring about, and that he intended by his actions to make it succeed.

Some affirmative conduct by the defendant to help in planning or carrying out the crime is necessary. Mere physical presence by the defendant at the place and time the crime is committed is not, by itself, sufficient to establish his guilt. However, mere physical presence is enough if it is intended to help the principal offender and, in fact, does help him.

It is not necessary that you find that the defendant was actually present while the crime was committed.

The Government is not required to prove that anyone discussed, or agreed upon a specific time, or method of committing the crime. The Government is not required to prove that the crime was committed in the particular way planned or agreed upon, nor need the Government prove that the principal offender and the person alleged to be the aider and abettor directly communicated with each other

It is not necessary that the defendant have had the same intent that the principal offender had when the crime was committed, or that he have intended to commit the particular crime committed by the principal offender.

An aider and abettor is legally responsible for the acts of other persons that are the natural and probable consequence of a crime in which he intentionally participates.

An aider and abettor is legally responsible for the principal use of a weapon during an offense if the aider and abettor had actual knowledge that some type of weapon would be used, or if it was reasonably foreseeable to the aider and abettor that some type of weapon was required to commit the offense.

It is not necessary that all of the people who committed a crime be caught or identified, nor is it necessary that the principal be identified.

It's sufficient if you find, beyond a reasonable doubt, that the crime was committed by some, and that the defendant knowingly and intentionally aided and abetted the principal offender in committing the crime.

It's not necessary that the defendant have had the same intent that the principal offender had when the crime was committed, or that he have intended to commit the particular crime committed by the principal offender.

An aider and abettor is legally responsible for the acts of other persons that are the natural and probable consequence of a crime in which he intentionally participates. In any event, you may not convict Mr. Kitt of any count in this indictment unless you find, beyond a reasonable doubt, that Mr. Kitt was one of the two men

who forced Mr. Baker into the car.

With reference to the felonies of carjacking, the Court gave instructions that the essential elements of carjacking while armed included: (1) that the defendant took a motor vehicle from the immediate, actual possession of the complainant against the complainant's will, or that he aided and abetted the perpetrator in so doing, (2) that he, or someone he aided and abetted, knowingly used force or violence to take the motor vehicle by using actual physical force or violence, or taking the motor vehicle by putting the complainant in fear and (3) that the defendant, or someone he aided and abetted, was armed with a pistol when he committed the carjacking.

With reference to the Armed Robbery, the Court instructed the jury that the elements include: (1) the defendant, or someone he aided or abetted, took property of some value from the complainant against the Complainant's will; (2) The defendant, or someone he aided or abetted, took the property from the immediate actual possession of the complainant, or from the complainant's person; (3) the defendant, or someone he aided or abetted, used force or violence to take the property; (4) the defendant, or someone he aided or abetted, carried the property away; (5) the defendant, or someone he aided or abetted, took the property without right to it and with the specific intent to steal it; (6) that when the robbery was committed, the defendant or someone he aided and abetted was armed with a pistol.

With reference to Armed Kidnapping, the Court instructed the jury that the elements include: (1) that the defendant, or someone he aided or abetted, intentionally seized, confined, abducted or carried away the complainant against his will; (2) that he acted consciously means to act

consciously, voluntarily and on purpose, not mistakenly, accidentally or inadvertently; (3) that the defendant, or someone he aided and abetted, held or detained or acted with a specific intent to hold or to detain the complainant or the principals on purpose and (4) that the defendant, or the person he aided and abetted, was armed with a pistol when he committed the kidnapping. The Government must prove that the complainant was seized by use of coercion. If the complainant submitted to such seizure or detention, the Government must prove that the complainant did so involuntarily. Acts of coercion must be committed with the specific intent to confine the complainant. Coercion may be mental or physical coercion. The kidnapping does not have to be for monetary gain or for an illegal purpose, but may be for any purpose that the defendant or the principal believes might benefit him.

With reference to Felony Murder, the Court instructed, that the essential elements of felony murder while armed are: (1) that the Defendant, or someone he aided and abetted, shot Jesse Baker with a pistol that caused his death; (2) that the defendant, or someone he aided or abetted, was armed with a pistol when he did so, and (3) that the defendant, or someone he aided and abetted, shot Jesse Baker while attempting to commit armed robbery, kidnapping or armed carjacking, as the case might be.

It is not necessary to find that the person who caused Mr. Baker's death did so with the specific intent to kill him. Any killing, even if done without a specific intent to kill, and even if accidental, is murder in the first degree if committed in the perpetration, or attempt to perpetrate, an armed robbery, kidnapping while armed, or armed carjacking.

Two or more people acting together committing or attempting to commit armed robbery, armed kidnapping, or armed carjacking, and one of them, in the course of the felony and in furtherance of the common purpose to commit

the felony, kills a human being, both the person who committed the killing and the person or persons who aided and abetted in the felony, are guilty of felony murder.

Any person who aids and abets the commission of a felony is guilty of felony murder for a killing that was committed in furtherance of a common purpose to commit that felony, or killing, that that was in the ordinary course of things, a natural and probable consequence of acts done in committing that felony.

With reference to the charge of Possession of a Firearm during a Crime of Violence, the Court informed the jury that the essential elements include: (1) that the defendant, or someone he aided and abetted, possessed a pistol; (2) that the defendant, or someone he aided and abetted, possessed a pistol or imitation pistol while committing a crime of violence, and (3) that the defendant, or someone he aided and abetted, possessed a pistol or imitation pistol, knowingly and intentionally. This means consciously, voluntarily and on purpose, not mistakenly, accidentally, or inadvertently. The offense of armed robbery, kidnapping while armed, armed carjacking, first degree murder while armed, felony murder and premeditated first degree murder while armed and second degree murder while armed are crimes of violence.

If you are not convinced that the Government has proven beyond a reasonable doubt all the elements of at least one of these crimes of violence, then you must find the defendant not guilty of this offense.

REASONS FOR GRANTING THE PETITION

I. THIS COURT NEEDS TO TAKE THIS CASE TO DEMONSTRATE THAT THE DICTATES OF THE *IN RE WINSHIP* CASE AND ITS PROGENY CANNOT BE DILUTED TO VIOLATE THE 5TH AND 6TH AMENDMENT PROTECTIONS THAT THE GOVERNMENT HAS THE BURDEN TO PROVE EACH AND EVERY ELEMENT OF EACH AND EVERY COUNT.

In the instant case, the trial court gave instructions to the jury which, by operation of the aiding and abetting instruction, negated the instructions of the Court regarding the elements of the offense and the need to find each and every element beyond a reasonable doubt in order to find the defendant guilty. This complaint about the instructions was one of the very grounds upon which the defendant appealed to the District of Columbia Court of Appeals.

Oddly enough, the Court of Appeals agreed with us about the impropriety of using the very aiding and abetting instruction which was used in this case, and as a result of that agreement, they vacated two of the charges. However, they have refused to vacate the other charges, all of which have a specific intent element somewhere within them and have been allowed to stand despite the fact that, if the jury followed the aiding and abetting instructions as the trial court gave them, they could have convicted the defendant of all of the charges without finding that he had the specific intent to commit any of them.

Robbery is a specific intent crime; kidnapping is a specific intent crime; carjacking is a specific intent crime; possession of a prohibited weapon during a crime of violence is a specific intent crime; and felony murder, while not totally a specific intent crime, requires that the

underlying felony is a specific intent crime. The Appellate Court specifically ruled in the instant case, stating at p. 11 of the Appendix:

> Although *Wilson-Bey* [903 A.2d 818 (D.C. App. 2006] addressed accomplice liability for first-degree premeditated murder, its reasoning and holding apply to other aiding and abetting situations in which an accomplice is charged with an offense requiring proof of specific intent. In all such situations, the rule is exactly the same: where a specific *mens rea* is an element of a criminal offense, a defendant must have had that *mens rea* himself to be guilty of that offense, whether he is charged as the principal actor or as an aider and abettor.

Despite this very clear statement that the mens rea element between a principal and an aider and abettor must be the same, the Court refused to reverse and to remand for a new trial the other felonies which contain a mens rea element. While the Petitioner pointed out this very point to the D.C. Court of Appeals in its petition for rehearing and/or suggestion for rehearing en banc, the Court refused to reconsider its ruling and denied the motion for rehearing and for suggestion for rehearing en banc.

To permit a person to be convicted of one crime because they participate in another crime is to violate the requirements of *In Re Winship*, 397 U.S. 358 (1970) and thus the requirements of the 5th and 6th Amendments to the U.S. Constitution. That case requires that each and every element of each and every charge be determined by a jury at a standard of beyond a reasonable doubt. Indeed, the stricture is so strict that a judge is not permitted to decide one of the elements of a criminal conviction. See *U.S. v. Gaudin*, 515 U.S. 506 (1995). This Court has not hesitated

to consider the evidence and to find out whether or not each element has been decided beyond a reasonable doubt. See *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Adderley et al v. Florida,* 385 U.S. 39 (1966); *Gregory v. City of Chicago,* 394 U.S. 111 (1969); *Douglas v. Buden, Judge*, 412 U.S. 430 (1973); *Vachon v. New Hampshire,* 414 U.S. 478 (1974).

The instructions given to the jury in the instant case permit a person to be convicted of another crime merely because they are aiding and abetting a person in one crime and another crime is committed by the codefendant without the knowledge or intent of the first person. The jury was not told which crime could form the basis for transferred liability. Indeed, the jury was told that the intent to commit any crime by Mr. Kitt would form the basis for his conviction for any other crime that the codefendant committed, whether he intended or not. Nor is there any way to know what role the incorrect aiding and abetting instruction played in the jury's decision to convict on any one charge. Each of these crimes has a specific intent element. Since we do not know what crime the jury used to piggy back all of the others to find transferred guilt, the only solution is to vacate them all and to remand the case back for a new trial.

The instant conviction came out of the District of Columbia, the Superior Court. That Court is an Article I Court under the U.S. Constitution, but it is treated as a state court for many purposes. However, there is no question that this Court can examine a conviction from either a state court or a federal court to determine that it complies with *In Re Winship*, supra, standards. See *Jackson v. Virginia et al.*, 443 U.S. 307 (1979).

II. THE CHARGE OF POSSESSION OF A PROHIBITED WEAPON DURING A CRIME OF VIOLENCE IS

PARTICULARLY SUSPECT BECAUSE THERE IS NO EVIDENCE THAT PETITIONER POSSESSED A GUN DURING THIS INCIDENT AND THAT THERE IS NO EVIDENCE THAT CROCKETT'S GUN WAS EVER USED OR THAT THE PETITIONER SAW THE GUN UNTIL IT WAS USED TO SHOOT THE DECEDENT. THUS, THERE WAS NO EVIDENCE THAT THE PETITIONER KNEW THAT CROCKETT HAD A GUN.

The instruction on the possession of a prohibited weapon is particularly troubling because there is no evidence that the Petitioner even knew that Crockett possessed a gun. No one saw a gun on either man when Mr. Baker was taken into his car, and there were a lot of witnesses to the taking of Mr. Baker. The gun could have been located in Mr. Baker's car. Indeed, if it were in the glove compartment, Mr. Crockett was sitting on that side and well could have located it. This case is important to the whole country because guns are located all over the country and many such cases occur in the country where there are two perpetrators. No one can say that it is harmless to convict someone of possessing a gun where there is no evidence that he knew that the other man had a gun. Many jurisdictions have been passing enhancement statutes, and this Court should want to see that their implementation is fair and in accord with the key principles of our country. To convict someone based on the behavior solely of some other person offends our natural notions of fairness. Where the jury could only be confused by some right and some wrong instructions, the public cannot have an abiding belief that fairness ensued in the administration of justice. Only under extraordinary circumstances should the behavior of one person affect the guilt or innocence of another person. Such a situation is permitted in conspiracy cases, but no one was charged with conspiracy in the instant case. This Court should guide the country on when to have transferred guilt,

and how to preserve that most precious of rights, the right for each person to be convicted only after each element has been proven beyond a reasonable doubt.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the District of Colubmia Court of Appeals and remand it for a new trial.

Respectfully submitted,

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District of Columbia Court of Appeals.

Denon KITT, Appellant,
v.
UNITED STATES, Appellee.

No. 98-CF-1013.

Argued April 20, 2005.
Decided Aug. 3, 2006

(No. F-2334-97)

(Hon. A. Franklin Burgess, Jr., Trial Judge)

Lois R. Goodman, with whom David J. Ontell was on the brief, for appellant

Charles Neil Floyd, Assistant United States Attorney, with whom *Kenneth L. Wainstein*, United States Attorney, *John R. Fisher*, then Assistant United States Attoreny and *Thomas J. Tourish, Jr.* and *Patrick J. Rowan*, Assistant United Sstates Attorneys, were on the brief of appellee

Background: Defendant was convicted by jury in the Superior Court, A. Franklin Burgess, Jr., J., of first-degree premeditated murder while armed, three counts of first-degree felony murder while armed, three counts of armed robbery, kidnapping and carjacking, and possession of a firearm during a crime of violence. Defendant appealed.

Holdings: The Court of Appeals, Glickman, J., held that:
(1) there was insufficient evidence of premeditation and deliberation to support defendant's conviction for first-degree murder as an aider and abettor;
(2) convictions for felony murder with predicate felonies of robbery and kidnapping, on theory that defendant was an aider and abettor, could stand even absent evidence that defendant had specific intent to kill;
(3) conviction for felony murder with predicate felony of carjacking, on theory that defendant was an aider and abettor, could not stand, absent any evidence that defendant had specific intent to kill;
(4) defendant's statements to police were not product of "custodial interrogation," for Miranda purposes;
(5) defendant's waiver of his Miranda rights was knowing, voluntary, and intelligent; and
(6) defense counsel did not render ineffective assistance.

Affirmed in part; reversed and remanded in part.

*352 Lois R. Goodman, Newark, NJ, [sic] with whom David J. Ontell, Washington, DC, was on the brief, for appellant. Charles Neil Floyd, Assistant United States Attorney, with whom Kenneth L. Wainstein, United States Attorney, John R. Fisher, then Assistant United States Attorney, and Thomas J. Tourish, Jr., and Patrick J. Rowan, Assistant United States Attorneys, were on the brief, for appellee.

Before FARRELL, RUIZ and GLICKMAN, Associate Judges.

GLICKMAN, Associate Judge:
Appellant Denon Kitt was charged as one of two participants in the armed robbery, abduction and murder of Jesse Lee

Baker. Tried separately from his alleged accomplice, Kitt was convicted of one count of first-degree premeditated murder while armed, three counts of first-degree felony murder while armed, the three predicate felonies of armed robbery, kidnapping and carjacking, and possession of a firearm during a crime of violence. Although Kitt challenges his convictions on a variety of grounds, we affirm all but two of them. Our recent en banc decision in Wilson-Bey v. United States, 903 A.2d 818 (D.C.2006) requires us to reverse Kitt's premeditated murder and felony murder (carjacking) convictions (but not his two other felony murder convictions) for lack of proof that he had the requisite mens rea to commit those two offenses.

I. The Evidence at Trial

Jesse Lee Baker, the decedent, was the landlord of an apartment building complex located in the 3700 block of First Street, S.E., in the District of Columbia. When Baker made a visit to the complex to receive a $300 money order from a tenant, Kitt and a second man, who was later identified as Steven "Sweets" Crockett, were there waiting for him.FN1 The two men accosted Baker as he was about to leave, frisking him and pushing him onto the hood of his car. Witnesses who knew and recognized Kitt saw him remove Baker's car keys from Baker's pants pocket and heard him ask Baker "What you got, what you got?" The two men then forced Baker into the back of his car and drove off, with Kitt at the wheel and Crockett in the front passenger seat. They were gone by the time the police arrived.

FN1. Witnesses testified that Kitt inquired when Baker was expected to arrive.

That evening, police officers responding to a report of a shooting in the 2200 block of Prout Street, S.E., came upon Baker's stolen car in an alley. Baker's body, clad only in a T-shirt, was lying in the back seat. Baker had been shot in the right side of his head and shoulder, and also in his wrist and hand. FN2 Kitt had been observed in the vicinity of Prout Street earlier*353 that evening by a witness who knew him from the neighborhood. This witness testified at trial that he saw Kitt removing his coat and "running fast" down R Street, away from Prout Street and toward his grandmother's house.

FN2. In addition to recovering the fatal bullets, which could have been fired by a .38 caliber revolver, the police found the $300 money order that Baker had collected. Crockett's fingerprint was on the money order.

Another prosecution witness, Kitt's close friend Tom Catlett, testified that Kitt came to him and said that "he had got into a situation that he wasn't supposed to be in" with Crockett-"a murder situation." Kitt told Catlett that "Sweets" unexpectedly shot someone with whom they were riding in a car: "He [Kitt] said he took his eyes off the scene for a minute and a gun went off." FN3

FN3. Catlett also testified that Crockett had displayed a .38 caliber revolver to him and Kitt a few weeks before the shooting.

To the detectives who arrested him, Kitt denied being present when Baker was killed but admitted being in Baker's car

afterward. Describing himself as a car thief, Kitt said that he happened upon the car on Prout Street, saw that its door was open, got in, and looked around for the keys in order to steal the vehicle. Upon glancing in the back seat, however, he saw Baker's dead body. Immediately, he said, he jumped out of the car, slammed the door and ran. FN4

FN4. Although Kitt did not testify at trial, he presented an alibi defense, which need not be described here.

II. The Murder Convictions

A. First-degree Premeditated Murder

[1] [2] [3] [4] First-degree premeditated murder is murder committed with the specific intent to kill after premeditation and deliberation. Williams v. United States, 858 A.2d 984, 1001 (D.C.2004). "Premeditation means that the defendant formed the specific intent to kill the victim for some length of time, however short, before the murderous act." Id. (internal quotation marks and citations omitted). Deliberation, "which is separate from premeditation, requires that there was the reflection and turning over in the mind of the accused concerning his existing design and purpose to kill." Id. (internal quotation marks and citation omitted). Thus, in order for a charge of first-degree premeditated murder to be sustained, "the evidence must demonstrate that the accused did not kill impulsively, in the heat of passion, or in an orgy of

frenzied activity." Frendak v. United States, 408 A.2d 364, 371 (D.C.1979).

[5] [6] [7] [8] [9] Kitt's argument that there was insufficient evidence of premeditation, deliberation or even a specific intent to kill on his part is well-taken. As a general rule, the requisite mens rea may be inferable from the facts and circumstances surrounding a murder, Ruffin v. United States, 642 A.2d 1288, 1291 (D.C.1994), but it is difficult to draw that inference in this case because the circumstances of Baker's killing remain shrouded in mystery. The only eyewitness account of the shooting presented at trial was Kitt's version as reported by Catlett. According to that truncated account, Kitt neither anticipated nor intended the shooting. While the jury was free to disregard Kitt's account as self-serving and unreliable, it had no other direct evidence of exactly what occurred when Baker was killed. Arguably, as the government contends, there was sufficient evidence of premeditation and deliberation (and more than sufficient evidence of a specific intent to kill) on the part of the shooter, given that he brought the murder weapon to the scene, had ample time in which to contemplate and plan the shooting, fired more than one shot, and had a *354 motive to eliminate Baker as a witness.FN5 Cf. Baker v. United States, 867 A.2d 988, 1008 (D.C.2005); Busey v. United States, 747 A.2d 1153, 1161-62 (D.C.2000). But there was no proof that Kitt was carrying a handgun or that he was the shooter; the only evidence was that it was Crockett.FN6 That Kitt carried out a preconceived plan to rob and abduct Baker certainly supported Kitt's conviction for felony murder, but it did not establish that Kitt also premeditated and deliberated Baker's slaying.

FN5. Even as to the shooter, the question of premeditation and

deliberation is a close one. Kitt argues that it is equally consistent with the evidence to infer that Crockett shot Baker out of frustration and anger after discovering that Baker was not carrying any large amount of cash. That may be so, but in evaluating the sufficiency of the evidence, we must view it in the light most favorable to the government, giving full play to the jury's right to determine credibility, weigh the evidence, and draw justifiable inferences of fact. Rivas v. United States, 783 A.2d 125, 134 (D.C.2001) (en banc). The prosecution need not negate every possible inference of innocence. Irick v. United States, 565 A.2d 26, 31 (D.C.1989). The key point is that the verdict cannot rest on mere speculation; we must be satisfied that there was some evidence on which a reasonable jury really could find the essential elements of the offense, including the essential mens rea, beyond a reasonable doubt. Id.

FN6. Kitt's statement to Catlett to the effect that Crockett was the shooter was corroborated by Catlett's testimony about Crockett's display of a handgun that could have been the murder weapon. (No witness claimed to have seen Kitt in possession of a handgun.) The fact that Baker was shot on his right side might also be taken to indicate that Crockett was the shooter rather than Kitt, given where the three men last were seen sitting in the car. We note that at Kitt's sentencing, the government acknowledged that Kitt "was not the person who fired the fatal bullets," and the trial judge similarly expressed his understanding that "Mr. Kitt was not the shooter."

[10] Kitt was prosecuted on the theory that he would be guilty of Baker's premeditated murder as an aider and abettor even if he did not intend it, so long as it was a "natural and probable

consequence" of the other crimes (robbery, kidnapping, carjacking) he did intend to commit. Over Kitt's objection, the jury was instructed in accordance with that theory,FN7 which did have support in our case law at the time of Kitt's trial. See, e.g., Morriss v. United States, 554 A.2d 784, 789 (D.C.1989). More recently, however, in Wilson-Bey, supra, this court sitting en banc disavowed both the "natural and probable consequence" theory of aiding and abetting liability for premeditated murder and the jury instruction embodying that theory. We explained that the "natural and probable consequence" theory and instruction are erroneous and, indeed, unconstitutional, precisely because they purport to authorize a jury to find a defendant guilty as an accomplice to a crime without proof-required by both that crime and the aiding and abetting statute-that the defendant himself had the essential mens rea to commit that crime. The correct rule with respect to premeditated murder, we held, is that the prosecution must prove that the defendant personally had the requisite mental state to commit the offense- i.e., that the defendant acted with a specific *355 intent to kill after premeditation and deliberation-whether the defendant is charged as the principal actor or as an aider and abettor.

FN7. In delivering what was then the standard jury instruction on aiding and abetting in the District of Columbia, the trial court included the following:

It's not necessary that the defendant have had the same intent that the principal offender had when the crime was committed, or that he intended to commit the particular crime committed by the principal offender. An aider and abettor is legally responsible for the acts of the other persons that are the natural

and probable consequence of a crime in which he intentionally participates.

See Criminal Jury Instructions for the District of Columbia, Instruction 4.02 (revised 4th ed.2005).

[11] [12] Accordingly, because the government failed to present and the jury instruction failed to require the necessary proof of specific intent to kill, premeditation and deliberation by Kitt, we reverse his first-degree premeditated murder conviction for insufficiency of the evidence.FN8

FN8. Kitt challenges his premeditated murder conviction on the additional ground that the trial court did not instruct the jury on the need to find "malice," even though the statute defines the offense in terms of killing another "purposely ... [with] deliberate and premeditated malice." D.C.Code § 22-2101 (2001 & 2005 supp.). Kitt's failure to object to the instruction on this ground at trial means that we review only for plain error, but there was no error at all. The trial court delivered the standard instruction used in this jurisdiction to define premeditated murder in cases in which there is no evidence of self-defense or mitigation. See Criminal Jury Instructions for the District of Columbia, Instruction 4.17. Following this court's suggestion in Comber v. United States, 584 A.2d 26, 42 n. 18 (D.C.1990) (en banc), the standard instructions eschew the vague word "malice" whenever possible in favor of describing with specificity the mental state (or states) encompassed within the term, so as to provide clearer guidance to the jury. See Burton v. United States, 818 A.2d 198, 200 (D.C.2003) (approving standard instruction on crime of malicious disfigurement). In the case of first-degree

premeditated murder, as the commentary to Instruction 4.17 explains, the statutory term "purposely" is synonymous with "intentionally," Collazo v. United States, 90 U.S.App. D.C. 241, 246-47, 196 F.2d 573, 578-79 (1952), and the malice element therefore is satisfied only by proof of a specific intent to kill-which is just what Kitt's jury was told it had to find (in addition to premeditation and deliberation).

B. The First-degree Felony Murder Convictions

[13] [14] The first-degree murder statute, D.C.Code § 22-2101, defines two types of felony murder, with differing mens rea requirements, depending on whether the underlying felony is specifically enumerated in the statute or not. If a lethal injury is inflicted in the perpetration (or attempted perpetration) of an enumerated felony, it is first-degree felony murder even if the perpetrator did not intend to kill the victim. The only intent required to be guilty of the offense is the intent to commit the underlying felony. Lee v. United States, 699 A.2d 373, 385 (D.C.1997). On the other hand, if the lethal act was in furtherance of an unenumerated felony, it is not first-degree felony murder unless the perpetrator actually did intend to kill the victim (though the perpetrator need not have acted after premeditation and deliberation). See Comber, 584 A.2d at 39 & 39 n. 14; Goodall v. United States, 86 U.S.App. D.C. 148, 150, 180 F.2d 397, 399 (1950). See also Criminal Jury Instructions for the District of Columbia, Instruction 4.23(I)(B).

[15] Kitt was convicted of three counts of felony murder, one each for the robbery, kidnapping and carjacking of which he

was found guilty. While robbery and kidnapping are enumerated felonies, carjacking is not an enumerated felony. This difference is important in view of the lack of sufficient evidence of a specific intent to kill on Kitt's part. Kitt's convictions as an aider and abettor of felony murder based on the robbery and the kidnapping stand even if he had no such intent. As our opinion in Wilson-Bey explains, it is not error to give the "natural and probable consequence" instruction with respect to a felony murder charge based on an enumerated felony, because an intent to kill does not need to be proved for a defendant to be convicted on such a charge, either as a principal actor or as an aider and abettor. See id., at 354. Thus, Kitt could be found *356 guilty of felony murder (robbery) and felony murder (kidnapping) based solely on his culpable participation in the enumerated felonies. See Lee, 699 A.2d at 385. FN9

FN9. Although Kitt has attempted to dispute it, the jury readily could find that Baker's murder was committed "in furtherance of the common design or plan to commit the underlying [enumerated] felon[ies], or [was] the natural and probable consequence of acts done in the perpetration of" those felonies. Lee, 699 A.2d at 385 (internal quotation marks, brackets and citations omitted). While the precise reason Baker was killed is unknown, it would strain credulity to suggest that his death had no causal connection with his robbery and abduction. Indeed, in the absence of any evidence of an intervening cause, it is enough to sustain the jury's findings of guilt that those "underlying felon[ies] and the killing were all part of one continuous chain of events." Id. (internal quotation marks and citations omitted).

[16] [17] It is otherwise with regard to the felony murder count based on the carjacking. Although Wilson-Bey addressed accomplice liability for first-degree premeditated murder, its reasoning and holding apply to other aiding and abetting situations in which an accomplice is charged with an offense requiring proof of specific intent. In all such situations, the rule is exactly the same: where a specific mens rea is an element of a criminal offense, a defendant must have had that mens rea himself to be guilty of that offense, whether he is charged as the principal actor or as an aider and abettor.FN10 Thus, to be guilty as an aider and abettor of a felony murder based on an unenumerated felony, a defendant must be shown to have specifically intended the killing. To hold otherwise would be to obliterate, for accomplices only, the material difference between the two types of felony murder. Accordingly, Kitt's conviction on the felony murder (carjacking) count must be reversed, both because the "natural and probable consequence instruction" was improper with respect to that count, and because the evidence that Kitt had the specific intent to kill Baker was lacking.

FN10. This rule follows from the basic requirement, originally articulated and explained by Judge Learned Hand in United States v. Peoni, 100 F.2d 401 (2d Cir.1938), and now almost universally accepted, that "the accomplice be shown to have intended that the principal succeed in committing the charged offense." Wilson-Bey, at 903 A.2d at 831.

III. Remaining Challenges

Kitt's challenges to his remaining convictions do not call for extended discussion. Kitt primarily claims that his statements

to the police following his arrest should have been suppressed because they were obtained in violation of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Kitt was arrested in Virginia. As soon as a detective introduced himself and told Kitt that he was under arrest for a murder on Prout Street, Kitt launched into his explanation that he had nothing to do with the homicide and merely had attempted to steal the abandoned car in which Baker's body was found. The detective interrupted Kitt for Miranda warnings, which a second detective proceeded to read to him from a standard Fairfax Police Department form. As this was being done, Kitt interjected and tried to resume and reiterate his story, but he was told to wait until the detective was finished. Kitt read and initialed each warning himself and then read over and signed the completed waiver form. After that, Kitt repeated his account and responded to the detectives' questions until one of them happened to comment that they had tracked Kitt down in Virginia with the aid of his friend "Kenny." At that point Kitt asked for an attorney, and the interview was terminated.

*357 [18] [19] In denying Kitt's motion to suppress, the trial court found that his pre-warning statements were admissible because they were not the product of custodial "interrogation" within the meaning of Rhode Island v. Innis, 446 U.S. 291, 302, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). We agree; merely informing Kitt that he was charged with a murder on Prout Street did not amount to "words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." Id.; see Hawkins v. United States, 461 A.2d 1025, 1031 (D.C.1983). As to Kitt's post-warning statements, the trial court's finding that Kitt waived his rights knowingly, intelligently and voluntarily is well supported by the detectives' uncontradicted testimony.

Kitt was informed of his Miranda rights fully and correctly, and he was not pressured into waiving them; on the contrary, as the trial court observed, Kitt "obviously wanted to speak," and "when he wanted to stop, he knew to say: I now want a lawyer." Kitt's waiver was not per se invalid merely because he did not make an express statement that he wished to waive his rights and speak with the police. See North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).FN11

FN11. Kitt's related argument that his (superficially) exculpatory statement was not voluntary is without merit. See Colorado v. Connelly, 479 U.S. 157, 164-67, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (explaining that some kind of police coercion is necessary for a finding of involuntariness).

[20] [21] Kitt also complains about the trial court's response to two notes from the jury during its deliberations. One of the notes inquired about the availability of portions of Catlett's grand jury testimony that had not been introduced in evidence. The other note asked about the availability to testify of a person named Cheryl Banks, who was not a witness but who was named during the trial as someone who had seen Baker's abduction. The trial court responded by telling the jury, "You may consider all the testimony you have and any exhibits you have; however, the record is closed. Do not speculate about matters outside the record." Kitt objected to the last sentence on the ground that, considered in isolation, it might deter the jury from evaluating evidence that had been admitted regarding Catlett and Banks. We find this argument far-fetched, and we fail to perceive any likelihood of prejudice. The instruction was responsive to the jury's stated concern; it

was correct; and it was not "unbalanced" as Kitt contends. In essence, the court simply told the jury to consider the evidence presented and not to speculate about evidence not presented. We see no reason to think the jury misunderstood that simple notion. "Decisions regarding reinstruction of a jury are committed to the discretion of the trial court; absent abuse of that discretion we will not reverse." Davis v. United States, 510 A.2d 1051, 1052 (D.C.1986). There was no abuse here.

[22] Finally, Kitt asserts that his attorney rendered ineffective assistance at sentencing by giving "a complete cookie cutter allocution applicable to anyone, regardless of crime or station in life," by "provid[ing] no roadmap for the sentencing judge to fit the [sentence] to [Kitt's] rehabilitation needs ... in any way," and by referring in his sentencing memorandum to Kitt's "future ability to be a good role model to his children, when the presentence report indicated that [Kitt] does not have any children." FN12 These bare assertions are too conclusory to persuade us that counsel's performance was either deficient or prejudicial.*358 See Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In point of fact, counsel's allocution was not "cookie cutter." Citing Kitt's youth and potential for rehabilitation,FN13 counsel opposed the government's requested sentence of life imprisonment without parole and sought leniency in the form of concurrent sentencing. Counsel also brought Kitt's family to court, presented a letter from his mother, and urged the court to disregard the presentence report writer's finding that Kitt showed no remorse. Kitt does not say what more his attorney could have done, and we have no basis to think that he could have obtained a more lenient sentence. As it was, the trial court rejected the government's life without parole recommendation FN14 and sentenced Kitt instead to the minimum possible sentence for first-degree murder.

imprisonment for thirty years to life. See D.C.Code § 22-2104(b) (2001). The court deemed it "necessary" to impose consecutive sentences for the armed robbery and carjacking (though not also for kidnapping) because those crimes were committed separately from the ensuing murder. Kitt makes no plausible claim that his counsel could have persuaded the court to do otherwise.

FN12. Kitt did not request a hearing on his ineffective assistance claim by mounting a collateral challenge to his conviction pursuant to D.C.Code § 23-110 (2001). Instead, he has raised the claim for the first time in his direct appeal and has urged us to resolve it on the basis of the existing record. We have warned, however, that "in the overwhelming majority of cases, it is inappropriate to raise the issue of ineffective assistance of counsel on direct appeal" because a collateral attack usually will be essential to amplify and substantiate the claim. Simpson v. United States, 576 A.2d 1336, 1338 (D.C.1990).

FN13. The allegedly erroneous reference to Kitt's children was at worst a small mistake that played no role in Kitt's sentencing.

FN14. The court declined to sentence Kitt to life without parole on the grounds that (1) Kitt was not the shooter; (2) the circumstances of the killing were unknown; and (3) Kitt did not have a significant criminal record.

IV. Merger

The remaining counts of conviction are subject to merger. Specifically, since Kitt can be convicted of only one first-degree murder for Baker's killing, see Thacker v. United States, 599 A.2d 52, 63 (D.C.1991), one of the two remaining felony murder counts (the counts based on armed robbery and armed kidnapping) should be vacated. See Garris v. United States, 465 A.2d 817, 823 (D.C.1983). The surviving felony murder count then will merge with its underlying felony, see Jones v. United States, 828 A.2d 169, 181 (D.C.2003), while the other felonies will survive without merger.FN15 Mitchell v. United States, 629 A.2d 10, 11 n. 2 (D.C.1993). We leave it to the trial court on remand to effectuate these mergers and to resentence Kitt in accordance therewith. Since the trial court imposed a consecutive sentence on the robbery count and a concurrent sentence on the kidnapping count, we presume that the court will vacate the felony murder count based on the former rather than the latter felony so as to preserve the consecutive sentence structure it initially elected to impose. That, however, is a matter for the trial court to decide in the exercise of its sentencing discretion.

FN15. Contrary to Kitt's argument, his convictions for armed carjacking and armed robbery do not merge. Pixley v. United States, 692 A.2d 438, 440 (D.C.1997).

V. Conclusion

Kitt's convictions of first-degree premeditated murder and first-degree felony murder (carjacking) are reversed on grounds of insufficient evidence. His other*359 convictions are affirmed and his case is remanded for the trial court to vacate counts that merge and resentence Kitt as appropriate.

So ordered.

(19)

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 98-CF-1013

DENON KITT,

Appellant

F2334-97

v.

UNITED STATES

Appellee

BEFORE: Washington, Chief Judge; *Farrell, *Ruiz, Reid, *Glickman, Kramer, **Fisher, Blackburne-Rigsby, and Thompson, Associate Judges

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, the opposition and the response thereto, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

**Associate Judge Fisher has recused himself from this case.